83-1595

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

ARMANDO VALERIANO,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

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March 9, 1984

QUESTIONS PRESENTED

1. Whether the refusal of the Connecticut Superior Court to charge the jury in petitioner's murder case concerning petitioner's theory of the case denied him due process of law.

2. Whether the Connecticut Superior Court's refusal to permit the defendant in a murder trial to conduct meaningful cross-examination of the only prosecution witness denied him due process of law.

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STATE OF CONNECTICUT

The petitioner, Armando Valeriano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on December 27, 1983.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 191 Conn. 659 (1983) and appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on December 27, 1983. A timely motion to reargue was denied on January 26, 1984, by that court, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the refusal of the Connecticut Superior Court to charge the jury in petitioner's murder case concerning petitioner's theory of the case denied him due

process of law.

2. Whether the Connecticut Superior Court's refusal to permit the defendant in a murder trial to conduct meaningful cross-examination of the only prosecution witness denied him due process of law.

CONSTITUTION PROVISIONS INVOLVED

AMENDMENT XIV

Section 1. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Armando Valeriano, the petitioner here, was convicted in the Connecticut Superior Court of felony murder for having hired another individual to set fire to rental

property owned by petitioner's wife. [R. pp. 2,25] An infant, injured in the fire, died of her injuries somewhat more than one year later. The Connecticut Supreme Court affirmed the conviction.

At approximately 6:57 p.m. on January 14, 1977, members of the New Haven, Connecticut Fire Department responded to an alarm at 281-283 Newhall Street. [11/5/79 Tr. p. 73] The firefighters traced the source of the fire to an area at the rear staircase starting on the second floor. [1/8/80 Tr. p. 80] In the attic they found the remains of a plastic jug which apparently had contained gasoline. [11/5/79 Tr. pp. 164-65]

While fighting the blaze, firefighters discovered a man crouched over a baby in one of the bedrooms. [11/5/79 Tr. pp.

84-85; 11/6/79 Tr. pp. 75-76] The baby, who was subsequently identified as Tashika Nelson [11/6/79 Tr. pp. 89-90], the six-month-old daughter of the apartment's tenant, died in April of 1978. [1/23/80 Tr. p. 216] Except for these two -- Tashika Nelson and her father -- no one else was in the building at the time of the fire. [11/7/79 Tr. pp. 3-4; 1/16/80 Tr. p. 102]

On June 19, 1978, shortly after the infant's death, Armando Valeriano -- the petitioner here -- was indicted for felony murder under the provisions of §53a-54c of the Connecticut General Statutes. [R.p. 2]

Julian Taylor, the State's chief witness at trial, confessed to setting the fire. [2/6/79 Tr. pp. 30-31] He accused Mr. Valeriano of paying him to set fire to

the house. [12/6/79 Tr. pp. 23,59] Much of the trial focussed on this witness, the only witness who attempted to connect Mr. Valeriano to the fire.

Mr. Taylor had an extensive mental health history [12/19/79 Tr. passim]; he had been in and out of mental institutions [12/19/79 Tr. pp. 3,7-9,32,46,72,137,142-43; 12/10/79 Tr. p. 13]; he had a history of alcohol and drug abuse [12/19/79 Tr. pp. 3, 8,24,27,34,41,114,137,161-65]; he had a long criminal record, including arrests and convictions for forgery [12/19/79 Tr. pp. 51-52,63; 1/2/80 Tr. pp. 56,87,112-33], stolen checks and bonds [1/2/80 Tr. pp. 56, 79-80,83], and burglaries [1/2/80 Tr. pp. 77-78,82-83]; and had frequently been incarcerated [12/19/79Tr. pp. 5-6,21,37,53, 66; 1/2/80 Tr. pp. 80,83]

Mr. Taylor was the only witness to connect the petitioner with the crime. Yet, on cross-examination, he was allowed repeatedly and irrationally to invoke the Fifth Amendment as an excuse for refusing to answer the questions of defendant's counsel -- including questions regarding prior occasions on which he had falsely accused others of committing crimes. [e.g., 1/2/80 Tr. pp. 5,13-17] The trial court sustained Taylor's refusal to answer these questions, and the Connecticut Supreme Court affirmed those rulings.

The evidence indicates that Tashika Nelson's death was unintentional and unforeseen. [12/6/79 Tr. pp. 22,33,41-41; 12/11/79 Tr. pp. 110-12,115] In addition, there was no evidence that Mr. Valeriano committed or solicited the homicide, or

that he was armed with a deadly weapon or dangerous instrument. The evidence readily supports the conclusion that Mr. Valeriano did not reasonably believe that Julian Taylor was armed or that Mr. Taylor's conduct might result in the death or serious injury of another. [11/7/79 Tr. p. 80; 12/6/79 Tr. pp. 22,33,41-42; 12/11/79 Tr. pp. 110-12,115]

Aside from attacking the credibility of the chief prosecution witness, Mr. Valeriano's defense was the affirmative defense provided by §53a-54c of the Connecticut General Statutes:

> "[I]t shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid

> the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

Despite timely and repeated requests, the trial court refused to instruct the jury on this defense. [11/5/79 Tr. pp. 22-24,34-38,53; 2/4/80 Tr. pp. 17-18,29, 47; 2/7/80 Tr. pp. 24-25,35-36] The Connecticut Supreme Court found no error in this refusal.

REASONS FOR GRANTING THE WRIT

I

THE COURT'S REFUSAL TO CHARGE THE JURY CONCERNING PETITIONER'S THEORY OF THE CASE DENIED HIM DUE PROCESS OF LAW

The refusal to charge the jury concerning the defendant's theory of the case, if that theory is supported by the evidence, denies due process of law. See United States v. Washington, 688 F.2d 953 (5th Cir. 1982); United States v. Felsen, 648 F.2d 681, 685-86 (10th Cir.), cert. denied, 102 S.Ct. 317 (1981); Kohler v. Commonwealth, 492 S.W.2d 198 (Ky.App. 1973). In a case like this one, in which failure to charge the defense theory prevented the jury from even considering it, the refusal so to charge in effect denies the defendant his right to present a defense. Brooks v.

Tennessee, 406 U.S. 605, 612 (1972).

Even assuming after Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977), that the State may constitutionally burden a defendant with proving an affirmative defense, as under Conn. Gen. Stat. §53a-12(b), the petitioner clearly established all affirmative defenses. The evidence presented at trial would support a jury's finding that each of the four aspects of the affirmative defense had been proved by a preponderance of the evidence.

That the requirements of sub-section (A) of the statute were met is not disputed. At no time did any of the State's witnesses, including its chief witness Julian Taylor, ever claim that Mr. Valeriano committed a homicidal act or

solicited, requested, commanded, importuned, caused, aided the commission of such an act. At most, the State claims that Tashika Nelson died as the result of a fire which Mr. Valeriano planned. The arson itself cannot constitute the "homicidal act" described by sub-section (A) for the same reasons discussed below with reference to sub-section (C) of the statute.

Nor is there any dispute as to whether the requirements of sub-section (B) were met. The State never claimed that Mr. Valeriano was armed with either a deadly weapon or a dangerous instrument.

Similarly, petitioner has met his burden with respect to sub-section (C). There was no evidence that petitioner knew or had any reason to know that Julian Taylor was armed. In fact, the State never

claimed that Mr. Valeriano had a reasonable ground to believe that Julian Taylor was armed with either a deadly weapon or a dangerous instrument of any sort.

Assuming the facts most favorable to the State, Mr. Valeriano might have known that Julian Taylor had the materials with which to set a fire. Every case of arson necessarily involves an instrument capable of setting a fire which may cause death or serious physical injury. The materials used by Julian Taylor to start the fire, however, cannot be considered a "dangerous instrument" under Connecticut General Statutes §53a-3. If they were, the affirmative defense in §53a-54c would have no meaning in the case of arson-murder. Proof of the underlying crime of arson would carry with it proof of the use of incen-

diary materials which, if they are considered to be a "dangerous instrument," would automatically disprove the affirmative defense.

The only part of the affirmative defense where the State had even a colorable claim was sub-section (D). Even there the evidence in the Record raised a question of fact which could be decided only by a jury.

The prosecutor's key witness testified repeatedly that the house was supposed to be empty at the time of the fire. [12/6/79 Tr. pp. 22,33,41-42; 12/11/79 Tr. pp. 110-12,115] According to him, Mr. Valeriano took precautions to insure that the tenants were not home. According to the State's own version of the evidence, Mr. Valeriano himself made sure that the downstairs

tenant, Ollie Gomez, was out of the building. [11/7/79 Tr. p. 80; 12/6/79 Tr. pp. 22,29; 12/11/79 Tr. p. 110] He also took the upstairs tenant, Joann Nelson, with him [11/7/79 Tr. p. 80] and assumed that the apartment would be empty if no car were parked in front of the building. The Record, therefore, supports the conclusion that, even if Mr. Valeriano were involved in the arson, he had no reasonable ground to believe that the fire would result in death or serious physical injury.

Failure to charge the jury with the full language of the statute made it impossible for the jury to absolve Mr. Valeriano of legal responsibility for the death of Tashika Nelson on the basis of the affirmative defense. If the trial judge had instructed the jury on the affirmative

defense, the jury might have found Mr. Valeriano not guilty of arson-murder even if the State met its burden of proving the essential elements of the offense. Without such a charge, however, "the jury may have interpreted the judge's instruction as constituting...a conclusive presumption... [and] have deprived [the] defendant of his right to the due process of law...." Sandstrom v. Montana, 442 U.S. 510, 524 (1979).

This Court in Washington v. Texas, 388 U.S. 14, 19 (1967), has held that criminal defendants have a fundamental due process right to establish a defense. The Connecticut Supreme Court has denied petitioner that right.

II

THE STATE COURT'S REFUSAL TO PERMIT THE DEFENDANT IN A MURDER TRIAL TO CONDUCT MEANINGFUL CROSS-EXAMINATION OF THE ONLY PROSECUTION WITNESS DENIED HIM DUE PROCESS OF LAW

The State's key witness, Julian Taylor, was the only witness who connected Mr. Valeriano to the crime. His testimony constituted virtually the entire case against Mr. Valeriano. Mr. Taylor testified irrationally, inconsistently and non-responsively. On cross-examination, he evaded counsel's questions or did not answer at all, at his own discretion. As a result, Mr. Valeriano was unable adequately to cross-examine his accuser and was thereby denied his constitutional right to confront the State's chief witness, as guaranteed by the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to the

United States Constitution.

Taylor repeatedly hid behind a Fifth Amendment claim of privilege. The trial court allowed and even encouraged Taylor to select his own cut-off point, testifying when and how he chose. Mr. Taylor was able to distort and garble the truth by testifying about incidents as to which he later, inconsistently, claimed a Fifth Amendment privilege. In those numerous instances when Mr. Taylor invoked the Fifth Amendment, Mr. Valeriano was unable to elicit any answers except those which Mr. Taylor chose selectively to give. Mr. Valeriano was, therefore, denied the basic protections of the Sixth and Fourteenth Amendments.

The constitutional protections guaranteed a witness by the Fifth Amendment are a

shield against coerced self-incrimination. They are not a sword to be used at the witness's pleasure against a criminal defendant. See United States v. Apfelbaum, 445 U.S. 115, 117 (1980) (Fifth Amendment privilege allows witness to remain silent but not to swear falsely); Rogers v. United States, 340 U.S. 367 (1951) (witness should not be allowed to distort the facts by selective testimony); United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942), cert. dismissed, 319 U.S. 41 (1943) (privilege to suppress the truth is not a privilege to garble it).

A witness's direct testimony may be stricken if "the defendant [was] deprived of his right to test the truth of the direct testimony....if he [was], so much of the direct testimony as [could not] be sub-

jected to sufficient inquiry must be struck." Fountain v. United States, 384 F.2d 624, 628 (5th Cir. 1967), cert. denied sub. nom. Marshall v. United States, 390 U.S. 1005 (1968). In this case, Mr. Valeriano was limited in his cross-examination of Julian Taylor on issues directly relevant to the case. That testimony, therefore, should have been stricken from the Record. United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980).

Throughout the testimony, it is clear that Mr. Taylor, not the trial judge, determined which questions he would answer and which he would not answer because his answers would tend either to incriminate or simply to embarrass him.

This Court squarely held in Hoffman v. United States, 341 U.S. 479, 486-87 (1951)

that it is for the trial judge to decide whether the privilege is justified. The judge must "undertake a particularized inquiry to determine whether the assertion was founded on reasonable fear of prosecution as to each of the posed questions." United States v. Zappola, 646 F.2d 48, 53 (2d Cir. 1981). The trial judge in this case abdicated his responsibility by allowing and even encouraging Julian Taylor to assert a Fifth Amendment privilege at will.

Even assuming that answering selected questions might have tended to incriminate him, it is clear that Mr. Taylor repeatedly waived his right to silence. Waiver shall be inferred if "(1) the witness's prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view

of the truth, and (2, the witness had reason to know that his prior statements would be interpreted as waiver of the Fifth Amendment's privilege against self-incrimination." Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981). Mr. Taylor testified voluntarily, under oath, in such a way as intentionally to distort the truth and to accuse Mr. Valeriano. He unequivocally waived his Fifth Amendment privilege.

The trial court repeatedly upheld Julian Taylor's assertion of a Fifth Amendment privilege based purely on Mr. Taylor's embarrassment, personal sensibilities and whims rather than a legitimate claim of self-incrimination. The particularized inquiry to be undertaken by the trial judge, as required by United States v. Zappola, supra, was a sham. The court made

no independent determination that Mr. Taylor's claims were valid. In those instances when Mr. Taylor might have had a valid Fifth Amendment claim, he clearly waived the privilege.

For example, on December 20, 1979, the following colloquy took place [12/10/79 Tr. pp. 14-15,22-23]:

"Q Now, that surgery was performed because you had suffered a gunshot would in that area of your body; is that true?

A Correct, sir.

Q And that was a gunshot wound that you inflicted on yourself; wasn't it?...

A -- no, sir.

Q You said not?

A (No response.)

Q Mr. Taylor, if you didn't shoot yourself, who shot you?...

THE WITNESS: Your Honor, in relation to that incident, I am not going to discuss it. I have admitted suffering a gunshot wound, and as far as that, that is all I am going to admit to. I had surgery --

THE COURT: Would you prefer waiting for [your attorney]?

THE WITNESS: Yes, I have already discussed it with [my attorney], but I also want him here. I have admitted to the Court that I had surgery and I was shot. As far as anything else that is dealing with my personal life -- ...

THE WITNESS: As far as to the question, I invoke the Fifth Amendment.

Q You what? You are claiming that if you tell us who shot you, you will be incriminating yourself?

A I didn't say that....

THE COURT: The Fifth Amendment, Mr. Taylor -- what you are saying, in effect, is that you will not answer that question on the basis it may be self-incriminating; is that correct, sir?

THE WITNESS: Yes, sir.

MR. WILLIAMS: I ask that the witness be directed to answer. It is patently absurd, with all deference, for a man to come in here and tell us who committed a crime against him, he is going to be incriminated, since he has already denied that he shot himself.

THE COURT: Mr. Williams, you may have an exception for the record. The witness has invoked the Fifth Amendment indicating that invoking the privilege against self-incrimination. I am going to allow it....

MR. WILLIAMS: I want to make a motion

with regard to all of this witness' prior testimony. If he can be allowed to testify for one side and then take the Fifth, when I try to cross him, then that's a denial of the right to confrontation and his entire testimony should be stricken at this time and I so move.

THE COURT: Motion is denied. Exception is noted for the record."

The trial judge upheld Julian Taylor's assertion of privilege with no further inquiry. Mr. Taylor's only justification for his claim -- that the question deals with his family life -- is not a legitimate ground for claiming the privilege. In no way could an answer be incriminating. If Mr. Taylor spoke truthfully when he denied shooting himself, identification of the shooter could incriminate him only if he

had illegally caused the shooting.

Later the same day, Mr. Taylor again invoked the Fifth Amendment [12/10/79 Tr. pp. 52-54]:

"Q Mr. Taylor, it is true, isn't it, that on the night of the 29th of September to the 30th of September, during that night, you did, in fact, shoot your wife twice in the chest?...

A You're liar.

Q You deny shooting your wife?

A I said you are a liar.

THE COURT: Mr. Taylor, the answer is yes, no, I invoke the Fifth or I want to talk to my lawyer? But, you have got to answer the question. That was a question and not a statement.

THE WITNESS: I answered the question, to the best of my ability....I think he

knows what I called him. I said the answer is no, and I am still invoking the Fifth in regard to that whole incident.

Q Is your answer no? Your answer is no, isn't it?

A I just invoked the Fifth in regard to that....

THE COURT: Do you feel, in answering that question, that that question might tend to incriminate you in some way, is that the reason you are invoking the Fifth?

THE WITNESS: For two reasons. Number one, the man is telling a lie as I stated in Court.

The other reason I am invoking it, it has nothing to do with this case here, felony murder.

MR. WILLIAMS: Because of that, I ask that the witness be directed to answer the

question. Those are not proper grounds....

THE COURT: Mr. Taylor, the Fifth Amendment protects any person from making any statement that would be self-incriminating. That is the whole purpose of taking the Fifth....

Any other reason is that it may tend to incriminate, not does. May tend to. Any other reason is not acceptable under the Fifth Amendment.

THE WITNESS: I will take the Fifth Amendment on that. And as I asked the Court yesterday, when it comes to my family --

THE COURT: All right, sir. Enough. He has invoked the Fifth. I am going to accept that, sir.

MR. WILLIAMS: Can I have an exception?

THE COURT: Exception is noted."

The State court's exceptionally permissive view of the Fifth Amendment was especially prejudicial to the petitioner when it allowed Taylor on that ground to refuse to answer questions about earlier occasions on which he had falsely accused others of crimes:

"Q And the purpose of that meeting [with Detectives of the Hartford Police Department] was that you accused the woman who was then your wife of attempting to murder you; isn't that true?

A I'll take the Fifth on that, sir.

Q I beg your pardon?

A I'll take the Fifth on that....

THE WITNESS: May I say something, your Honor? This involves my mother and father. My mother and father have nothing to do with this case.

In order to show the Court that things were taken out of my house that I was living there, they were owned by me solely, things were returned to my mother's house by my ex-wife and her brother or she would have been arrested.

Now, my family is not on trial here. Mr. Valeriano's family is not on trial here. It is just Mr. Valeriano and myself. And I have asked that my mother and father's name not be brought in here or my family and this has been brought up here....[1/2/80 Tr. pp. 5,13-14]

Q Did you tell Detective Bolden and Detective Morris that your wife, Julie Taylor, had stolen household items out of your house after the time of the shooting and while you were hospitalized?...

A Yes, sir.

Q You did tell them that?

A I said I am taking the Fifth.

Q I'm sorry. I thought you said, yes, sir. [1/2/80 Tr. pp. 16-17]

Q When do you claim that you were married to Julie Taylor?

A I'll take the Fifth on that.

MR. WILLIAMS: May the witness be directed to answer?

THE COURT: Can I see the attorneys a moment?

(Discussion off the record at the bench.)

THE COURT: The witness invoked the Fifth. The Court will allow it....[1/2/80 Tr. pp. 44-46]"

The trial judge's failure to strike Mr. Taylor's testimony did not constitute harmless error. No other witness connected Mr.

Valeriano to the fire at 281-283 Newhall Street. The State's whole case rested on Mr. Taylor's testimony. Therefore, Mr. Taylor's credibility was central to the case. The defense should have been allowed to demonstrate Mr. Taylor's propensity to lie and to accuse falsely. If the defense had been allowed to show Mr. Taylor's complete unreliability, it would have undercut the State's chief witness and destroyed the core of the State's case.

A state defendant's basic constitutional right to confront his accuser is guaranteed to him by the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). Therefore, when the trial court allowed Mr. Taylor to testify selectively and to take the Fifth Amendment improperly, it denied

Mr. Valeriano his constitutional right to cross-examine and confront his accuser. Under Chapman v. California, 386 U.S. 18, 24 (1967), a reviewing court must inquire whether the constitutional error was harmless beyond a reasonable doubt. Using this standard, it is clear that the lower court committed reversible error when it allowed Mr. Taylor to distort and garble the truth and prevented Mr. Valeriano from challenging fully his only accuser's credibility.

In Klein v. Harris, supra, at 289-90, the Second Circuit found reversible error when the State's chief witness, who privately recanted, was allowed to take the Fifth Amendment after accusing the defendant, even though another witness also had accused the defendant. In this case, there was no other witness. The fact that Julian

Taylor took the Fifth Amendment on questions attacking his credibility rather than issues directly related to the charge against Mr. Valeriano should not matter. Mr. Taylor's credibility is central to the case. Granting Julian Taylor's Fifth Amendment claim and failure to strike Mr. Taylor's testimony deprived Mr. Valeriano of his constitutional right to confront his accuser. Alford v. United States, 282 U.S. 687 (1931); United States v. Lawson, 683 F.2d 688 (2d Cir. 1982); United States v. Cardillo, 316F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963); United States v. Pritchett, 699 F.2d 317 (6th Cir. 1983); United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); Moynahan v. Manson, 419 F.Supp. 1139 (D.

Conn. 1976); Reese v. State, 458 A.2d 492 (Md.Spec.App. 1983).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted:

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March 9, 1984

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APPENDIX A
CONNECTICUT SUPREME COURT DECISION

STATE OF CONNECTICUT
v.
ARMANDO VALERIANO
(10074)

PETERS, HEALEY, PARSKEY, SHEA and GRILLO, Js.

Convicted of felony murder (§53a-54c [Rev. to 1977]) in connection with the death of a child from the effects of smoke inhalation sustained during the arson of an apartment building, the defendant appealed to this court. Held:

1. Because §53a-54c contains no mens rea requirement beyond that of an intention to commit the felony upon which the felony murder charge is predicated, the trial court did not err in denying the defendant's motion for a judgment of acquittal or in omitting the requirement of mens rea from its charge to the jury,

the defendant's claim that the evidence indicated the absence of an intention to cause the death of the victim notwithstanding.

(One judge dissenting)

2. The trial court did not err in refusing to instruct the jury on the affirmative defense to felony murder provided by §53a-54c; one of the elements of that defense is that a defendant did not "in any way solicit, request, command, importune, cause or aid the commission" of the homicidal act and here the guilty verdict returned by the jury necessarily imported a finding that the defendant did "solicit, request, command, importune, cause or aid" the commission of the underlying crime of arson which constituted the homicidal act.

(One judge dissenting)

3. The defendant's challenge, on grounds of competency and of improper invocation of the privilege against self-incrimination, to the trial court's admission of the testimony of T, the state's principal witness, was unavailing; the trial court acted within its discretion in determining that T was competent to testify, and the privilege against self-incrimination had been asserted by T in relation to matters unrelated to the crime in ussue.

Argued October 11--decision released December 27, 1983

Indictment charging the defendant with the crime of felony murder, brought to the Superior Court in the judicial district of

New Haven and tried to the jury before Foti, J.; verdict and judgment of guilty, and appeal by the defendant to this court. No error.

JOHN R. WILLIAMS, with whom, on the brief, was LUCY CARDWELL, law student intern, for the appellant (defendant).

JULIA D. DEWEY, assistant state's attorney, with whom, on the brief, were ARNOLD MARKLE, state's attorney, MARY M. GALVIN, assistant state's attorney, and EDWARD STEINER, law student intern, for the appellee (state).

SHEA, J. A jury found the defendant guilty of felony murder in violation of General Statutes (Rev. to 1977) §53a-54c

as a result of a death caused by arson in an apartment building at Newhall Street in New Haven which occurred on January 14, 1977. In his appeal the defendant claims that the trial court erred (1) in instructing the jury upon the import of the phrase "in furtherance of such crime" in our felony murder statute, §53a-54c; (2) in refusing to submit to the jury the affirmative defense available to one charged with felony murder; and (3) in denying the defendant's motion to exclude a witness as incompetent, in permitting that witness to invoke the privilege against self-incrimination, and in refusing to strike his testimony. We find no error.

At approximately 7 p.m. on January 14,

1977, members of the New Haven fire department responded to an alarm at an apartment building on Newhall Street. They discovered smoke and flames concentrated primarily at the rear of the building. In an apartment on the second floor they came upon a man and a six month old child, Tashika Nelson, who were at the time of the fire the only occupants of the building. The child died on April 27, 1978 [1], from the effects of smoke inhalation sustained during the fire.

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1. The fact that the victim died more than a year and a day after the criminal act was the basis for a motion to dismiss the indictment, which the court denied. This ruling has not been challenged on appeal.

Julian Taylor, the principal witness for the state, confessed to igniting the fire. He admitted his involvement after he returned to the building while the fire was in progress. Apparently his confession was motivated by his discovery that someone had been injured in the fire. He testified that the defendant, whose wife owned the building, had paid him to "torch" it, but had assured him that the building would be unoccupied at the agreed time. He had used gasoline to start the fire.

I

The defendant's claim as to the significance of the phrase "in furtherance of such crime or flight therefrom" in our

felony murder statute, §53a-54c[2], is

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2. General Statutes (Rev. to 1977) §53a-54c, at the time of the offense provided as follows:

"[General Statutes] Sec. 53a-54c. FELONY MURDER. A person is guilty of murder when acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, sexual assault in the first degree, sexual assault in the first degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom he, or another participant, if any, causes the death of a person other than one of the participants, except that in any

similar to that we have just rejected in

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prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any other dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

State v. Young, 191 Conn. 636, A.2d (1983). He argues that the phrase is intended to establish the requirement of a culpable state of mind with respect to a death occurring in the course of the felony in the form of an intention to cause the death or a reckless indifference to the likelihood of such a result. Since the evidence indicates not only a lack of such intention but a substantial effort by the defendant to ensure that no one would be in the building when the fire occurred, he contends that his motion for a judgment of acquittal should have been granted and also that the charge was erroneous in omitting the requirement of mens rea in respect to causing the death of the victim.

We concluded in Young that §53a-54c contains no mens rea requirement beyond that of an intention to commit the underlying felony upon which the felony murder charge is predicated. We also held that the "in furtherance" phrase functions primarily as a limitation on the vicarious liability of an accomplice, such as the defendant in this case, who does not perform the homicidal act, and that, in some exceptional cases, it also serves to exclude murders occurring in the course of a felony which result from other causes. The trial court did not err in denying the defendant's motion for an acquittal and in refusing his requests to modify the charge.

II

The refusal of the trial court to

instruct the jury upon the affirmative defense to felony murder which the statute provides, as requested by the defendant, is also claimed as error. After defining the crime of felony murder, §53a-54c makes the following exception: "except that in any prosecution under this section...it shall be an affirmative defense that the defendant (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely

to result in death or serious physical injury." An affirmative defense is one upon which the defendant has the burden of proof by a preponderance of the evidence. General Statutes §53a-12. Since the four conditions which must be met to establish the affirmative defense created by §53a-54c are stated conjunctively, the court was not obliged to submit this defense to the jury unless there was sufficient evidence to support a finding that each of those conditions had been proved by a fair preponderance of the evidence.

The defendant's claim that this affirmative defense should have been submitted to the jury founders upon the first of these conditions: "(A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid

the commission thereof...." Under the circumstances of this case the "homicidal act" was the arson of the building which resulted in the death of a child.[3] The state had the burden of proving the defendant's complicity in that crime in accordance with the requirements of General Statutes §53-8, which imposes criminal liability for the acts of another upon a person who, "acting with the mental state required for commission of an offense,...solicits, requests, commands, importunes or intentionally aids another

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3. The dissenting opinion is critical of our conclusion that the "homicidal act" was the arson, but fails to identify any other event which might have caused the homicide.

person to engage in conduct which constitutes an offense." The verdict of guilty which the jury rendered necessarily imports a finding beyond a reasonable doubt that the defendant did "solicit, request, command, importune, cause or aid" in the commission by Taylor of the underlying crime of arson which constituted the "homicidal act." It would have been wholly illogical and utterly confusing for the court to instruct the jury that, after making such a finding, they should also decide whether the defendant had sustained his burden of proving that he was not involved in the arson as an accomplice in accordance with the defendant's request. Where the "homicidal act" is the very crime alleged as the basis for accomplice liability, as in this case, it would be

completely inappropriate to submit to a jury the affirmative defense to felony murder. This conclusion makes it unnecessary to consider whether there was sufficient evidence to support a finding that the three remaining conditions for that defense had been proved.

III

The defendant challenges the testimony of the state's principal witness, Taylor, on two grounds: (1) that he was incompetent to testify as a witness; and (2) that he was allowed to invoke the privilege against self-incrimination improperly and thus to frustrate any cross-examination of him.

The defendant moved to exclude Taylor as a witness before he was permitted to testify. The court's denial of this

motion was well within the exercise of judicial discretion. "Because the competency of a witness is a matter peculiarly within the discretion of the trial court its ruling will be disturbed only in a clear case of an abuse or of some error in law." State v. Brigandi, 186 Conn. 521, 534, 442 A.2d 927 (1982); State v. Stankowski, 184 Conn. 121, 139, 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S.Ct. 596, 70 L.Ed.2d 588 (1981). The defendant refers to testimony of Taylor's treatment for chronic alcoholism and drug abuse at several mental institutions, his extensive criminal record, and other evidence which might affect his credibility. None of this evidence would warrant our overturning the determination of competency made by the trial court.

The circumstances cited by the defendant in which Taylor invoked his privilege against self-incrimination involved primarily an incident on September 30, 1978, in which he had been charged with shooting his former wife and in which he himself received two bullet wounds. During his cross-examination of Taylor the defendant inquired who had shot him, whether he had shot his wife, whether he had a gun in his possession at the time of the incident, and whether he had accused his wife of attempting to murder him. Taylor was also asked whether he had accused his wife of removing certain household goods from his home while he was hospitalized after the shooting incident, at what time he had married her, and whether he had concealed the true date of

their marriage in order to obtain social security payments fraudulently. We are not persuaded that the invocation of the privilege was uncalled for with respect to the inquiries concerning the shooting incident, the false reports or the fraudulent social security payments. "The privilege afforded not only extends to answers that could in themselves support a conviction...but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute..." Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); see Malloy v. Hogan, 378 U.S. 1, 12-13, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1963).

Even where the privilege is properly invoked it may become necessary to strike the testimony of a witness in order to

preserve a defendant's right of cross-examination. United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980). It is clear, however, that the subjects upon which Taylor invoked the privilege were entirely collateral to the circumstances of the arson about which he had testified on direct examination. Much of the defendant's cross-examination of him about such unrelated matters as the shooting incident seems to have been a highly questionable extension of the rule which permits attacking the credibility of a witness by utilizing specific acts of misconduct indicating untruthfulness. Martyn v. Donlin, 151 Conn. 402, 407-408, 198 A.2d 700 (1964); Shailer v. Bullock, 78 Conn. 65, 69-70, 61 A. 65 (1905).

The extreme sanction of striking the

testimony of a witness should be resorted to only where the invocation of the privilege blocks inquiry into matters directly relating to the crime charged and not those which are merely collateral, such as the subjects of the cross-examination for credibility in this case. United States v. Seifert, supra, 561; Fountain v. United States, 384 F.2d 624, 627-28 (5th Cir. 1967), cert. denied sub nom Marshall v. United States, 390 U.S. 1005, 88 S.Ct. 1248, 20 L.Ed.2d 105 (1968). "Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him." United States v. Cardillo, 316 F.2d 606, 611 (2d Cir.), cert. denied, 375 U.S. 822, 84 S.Ct. 60, 11 L.Ed. 2d 55

(1963).

We must also reject the claim of the defendant that Taylor, by voluntarily taking the witness stand, waived his privilege against self-incrimination. "Waiver can be inferred only 'if (1) the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment's privilege against self-incrimination.'" State v. Altrui, 188 Conn. 161, 170, 448 A.2d 837 (1982), quoting Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981). Neither of these conditions was fulfilled in this case, because the privilege was never invoked

with respect to any inquiries relating to the commission of the crime or the defendant's involvement in it, concerning which Taylor would be deemed to have waived the privilege. No such waiver can be implied for collateral matters related wholly to credibility. "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility." Fed. R. Evid. §608(b).

There is no error.

In this opinion HEALEY, PARSKEY and GRILLO, Js., concurred.

PETERS, J. (dissenting). This appeal, like that in State v. Young, 191 Conn.

636, A.2d (1983), decided today, raises serious questions about the interpretation of the felony murder statute, General Statutes §53a-54c (Rev. to 1977). As in State v. Young, I disagree with the majority's reading of that statute, and therefore dissent in this case as well.

The defendant herein was charged with felony murder for having hired someone to set a fire in a building in which a child died. At the trial and on this appeal, he maintains that he was entitled to have the jury instructed to consider the affirmative defense provided by §53a-54c.[1]

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1. [General Statutes (Rev. to 1977] Sec. 53a-54c. FELONY MURDER. A person is guilty of murder when acting either alone

ment that the death have occurred "in furtherance of" the underlying crime of

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or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, sexual assault in the first degree, sexual assault in the first degree with a firearm, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it

arson. Because I agree with this latter argument, for reasons set out in my dissent in State v. Young, I need not reach the other claims of error advanced

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shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that the other participant was armed with such a weapon or instrument; and (C) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

by the defendant.

It is worth noting, however, that the reading of §53a-54c which, in State v. Young, compelled the majority, for cases of arson murder, to treat "in furtherance of" as surplusage, now compels the majority to excise the affirmative defense that the statute expressly provides. The majority determines that the defendant was not entitled to his requested instruction on §53a-54c's affirmative defense because the defendant could not satisfy the first of the statutory conditions of this defense, which required him to prove that he: "(A) Did not commit the homicidal act or in any way solicit, command, importune, cause or aid the commission thereof..." The majority does not dispute the defendant's contention that there was

no evidence that he ever actually intended, in hiring his accomplice, to have him do anything other than to set a fire. The defendant plausibly arques that he therefore never committed or solicited any "homicidal act" whatsoever. To bridge the gap between the defendant's actual proven intent and the statutory condition of a homicidal act, the majority presumes, irrebuttably, that: "Under the circumstances of this case the 'homicidal act' was the arson of the building which resulted in the death of a child." Implicit in the majority's decision is the conclusion that, in the case of felony murder charges arising out of arsons, there can NEVER be an occasion for the affirmative defense which §53a-54c expressly provides. Indisputably, the

felony murder statute itself makes no such categorical distinction between deaths resulting from robberies or burglaries or arsons but rather allows an affirmative defense whenever it is factually appropriate. Bearing in mind the usual command to read penal statutes strictly; State v. Gallagher, 191 Conn. 433, 441, 465 A.2d 323 (1983); State v. Tedesco, 175 Conn. 279, 291, 397 A.2d 1352 (1978); I find the majority's equation of arson with a homicidal act unacceptable.

As in State v. Young, I believe that the majority's construction is not only unpersuasive on its face but is undermined by the subsequent enactment of the 1979 arson murder statute, General Statutes §53a-54d. The legislature's decision to eliminate the affirmative defense in that

statute was, I believe, a substantive change in the existing law which this court should not implement retroactively.

I therefore disagree with the affirmance of the defendant's conviction in this case.

APPENDIX B

ORDER DENYING MOTION TO REARGUE

NO. 10074

STATE OF CONNECTICUT SUPREME COURT

VS. STATE OF CONNECTICUT

ARMANDO VALERIANO JANUARY 26, 1984

O R D E R

THE MOTION OF THE DEFENDANT-APPELLANT TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY _____
Asst. Clerk-
Appellate

Notice to:
JOHN R. WILLIAMS, ESQ.
DAVID EGAN, A.P.D.
ARNOLD MARKLE, S.A.
MARY GALVIN, A.S.A.
JULIA DICOCCO DEWEY, A.S.A.
CLERK, SUPERIOR COURT, NEW HAVEN
REPORTER OF JUDICIAL DECISIONS, 1-27-84

NO. 83-1595

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

ARMAND VALERIANO,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

ARNOLD MARKLE
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With Whom On The Brief Is:

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QUESTION PRESENTED

Did The Connecticut Supreme Court Properly Apply The Doctrines Of Statutory Interpretation And Evidentiary Relevancy In Its Denial Of This Defendant's Appeal From A Conviction For Felony Murder?

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STATUTES AND RULES INVOLVED

Rule 17.1

Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

On June 19, 1978, the defendant, Armando Valeriano, was indicted for arson felony murder, Conn. Gen. Stat. § 53a-54c.[1] On February 11, 1980, after a three month trial, the defendant was found guilty as charged. Prior to and during trial, the defense raised several motions pertaining to the competency of the state's primary witness, Julian Taylor. After court ordered examinations and testimony relating thereto, the court determined that Julian Taylor was a competent witness.

The factual situation resulting in the defendant's conviction is as follows:

On the evening of January 14, 1977, firefighters responded to an alarm at 281-283 Newhall Street, New Haven, Connecticut. Smoke and flames were concentrated primarily in the rear of the building. During the course of extinguishing the fire, in the second floor apartment firefighters discovered the bodies of an adult male and an infant female. The infant, identified as six-month-old Tashika Nelson, died in April, 1978. The cause of her death was smoke inhalation sustained on January 14, 1977.

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[1] In relevant part, Conn. Gen. Stat. § 53a-54c (1979) provides:

> A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit . . . arson . . . and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (A) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (B) was not armed with a deadly weapon, or any dangerous instrument; and (C) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (D) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Julian Taylor was called as the state's chief witness. He testified that in January, 1977, he was approached by the defendant, an old friend, and asked by the defendant "to get rid of a house, torch a house." Julian Taylor was specifically told by the defendant that precautions would be taken to insure that the occupants of the second floor apartment would not be home. On January 14, 1977, at the defendant's direction, for a price of $500.00, Julian Taylor poured gasoline on the rear stairwell and landings of 281-283 Newhall Street, ignited the gasoline and departed the area.

Julian Taylor returned to the fire while it was in progress. He testified that due to his concern for those apparently injured, he immediately confessed his involvement to the police. He made several subsequent statements.

During direct examination, Julian Taylor admitted he was less than a model citizen, testifying about his involvement with several other New Haven area fires. He identified items of clothing and apparent incendiary equipment taken from his trunk on the night of the fire. He also testified concerning criminal convictions and alcoholism. During nine trial days of cross examination, Julian Taylor's testimony concerning the events of January 14, 1977 remained unchanged.

The conviction was affirmed on appeal.

THE CONNECTICUT SUPREME COURT DID NOT RESOLVE THE DEFENDANT'S CLAIMS IN A MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF ANY COURT.

Rule 17.1 of the United States Supreme Court Rules provides a guideline for consideration governing review on certiorari. It is clear that the Connecticut Supreme Court did not decide a federal question in a manner in conflict with other applicable state or federal appellate decisions.

Defendant argues that under state and federal law, a criminal defendant's due process rights encompass the right to proper jury instructions on the issue of defenses; *compare State v. Miller*, 186 Conn. 654, 660-61, 443 A.2d 906 (1982) *with Cupp v. Naughten*, 414 U.S. 141, 146 (1973) ("Before a federal court may overturn a conviction resulting from a state trial in which [an improper] instruction was used, it must be established not merely that the instruction [was] undesirable, erroneous or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment"). However, the trial court properly refused to charge the jury on the felony-murder affirmative defense. Defendant therefore received the process which was due, the Fourteenth Amendment/due process challenge to defendant's conviction is without substance.

Defendant's reliance on *Washington v. Texas*, 388 U.S. 14, 19 (1967) for the proposition that "criminal defendants have a fundamental due process right to *establish* a defense" is, under the special circumstances of this case, highly misleading. *Washington* was concerned with the criminal defendant's fundamental right "to *present* a defense" and "to *present* ... witnesses to establish a defense"; *Washington v. Texas*, 388 U.S. at 19 (emphasis supplied). That case invalidated a unique Texas statutory scheme which deprived defendants of the advantage of exculpatory testimony from alleged accomplices or co-

conspirators. As such, that case has nothing to do with the case at bar, in which defendant, acting without comparable statutory or court-made restraints, simply failed to introduce sufficient probative evidence to raise the affirmative defense. *Washington* cannot stand, as defendant seems to believe, for the proposition that criminal defendants have a due process right to establish an affirmative defense notwithstanding an inability to raise the same.

The decision of the Connecticut Supreme Court clearly conformed with all applicable federal authority and, consequently, should not be disturbed.

Defendant also argues that it was error for the trial court to deny defendant's motion to exclude the State's chief witness as an incompetent. That alleged error was compounded, in defense counsel's view, when the court allowed the chief witness to claim a Fifth Amendment privilege several times during the nine days of his cross-examination. The chief witness's invocation of the Fifth Amendment, the argument continues, abridged the defendant's Sixth Amendment right to confront his accuser and therefore requires a reversal of defendant's conviction.

Testimonial waivers of Fifth Amendment protections are "not lightly to be inferred"; *Smith v. U.S.*, 337 U.S. 137, 150 (1949). Indeed, so disfavored are testimonial waivers of rights against self-incrimination in the law that "courts . . . indulge every reasonable presumption against finding [them]"; *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

It is for the trial court in each case to decide whether or not the invocation of the Fifth Amendment by a witness is proper; see *Hoffman v. U.S.*, 341 U.S. 479, 486-87 (1951). The trial court's determination, when based on particularized investigation into the grounds of the witness's assertion of the privilege, should accordingly be upheld absent clear error; *accord, Ex parte Irvine*, 74 F. 954, 960

(C.C.S.D. Ohio 1896) ([William Howard] Taft,J.) ("The question is for the discretion of the [trial] judge, and in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence").

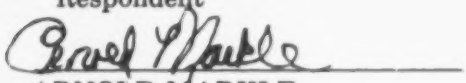
The privilege asserted in the present case was a valid exercise of the witness's right to protection against self-incrimination, thus not subject to attack by this defendant. The trial court's decision to allow this testimony was clearly not an abuse of discretion in light of the unique circumstances of this case. Just as the Connecticut Supreme Court rejected defendant's contention that the trial court abused its discretion, so should this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

The State of Connecticut,
Respondent



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I hereby certify that three copies of this brief have been mailed by April 16, 1984 to John R. Williams, Esq., 265 Church Street, New Haven, CT 06510.

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